

# Enterprise Liability and the Economic Analysis of Tort Law

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## I. INTRODUCTION

There is a consensus today among torts scholars concerning three propositions. First, it is agreed that American tort law has been shaped during the past three decades by the theory of enterprise liability. The strict products liability "revolution" is the most conspicuous example of the judicial implementation of this theory, but it is widely recognized that "the contours of modern tort law reflect a single coherent conception . . . which its proponents called the theory of enterprise liability . . . ."<sup>1</sup> Central to that theory are the policies of victim compensation and loss spreading.<sup>2</sup> It is also agreed by most scholars that the enterprise liability revolution has been a failure and that the "use of tort law as a device for expanding insurance protection against disabling injuries is . . . questionable."<sup>3</sup> Finally, although some may dissent, it is widely believed that economic analysis, focused on "liability incentives for the prevention of future injuries," is "the generally prevailing theory about the appropriate role of tort law."<sup>4</sup>

In this Article we argue that these widely held beliefs are profoundly flawed. Scholars who hold these beliefs misunderstand the theory of enterprise liability, inappropriately inflate the importance of economic analysis, and fail to understand the relationship between the enterprise liability theory and economic analysis. Moreover, the consequences of these misunderstandings transcend academic debates about tort "theory." These misunderstandings impede the development of a personal injury law that many of those who share these misunderstandings would applaud.

In Part II of this Article we set out the theory of enterprise liability as it was understood and articulated by its proponents. We demonstrate that,

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<sup>1</sup> George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 463 (1985).

<sup>2</sup> See *id.* at 470-71. For a compilation of decisions utilizing the loss spreading rationale, see Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 302 n.470 (1981).

<sup>3</sup> 1 REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 30 (American Law Institute, 1991) [hereinafter 1 REPORTERS' STUDY].

<sup>4</sup> *Id.* at 31-32; see generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987).

contrary to popular perception, strict products liability is merely one fragment of that theory, which also encompassed no-fault compensation plans and damages reform. Indeed, the no-fault idea and its application to the automobile and other accident settings were central features of enterprise liability scholarship from the late 1920s through the early 1970s. Thus it is ironic that scholars today mistakenly see no-fault as an alternative to a failed "enterprise liability" theory now seen as synonymous with strict products liability (and traditional damages rules). In Part II, we explain how the no-fault and damages reform aspects of the enterprise liability theory became obscured to the point that contemporary scholars could so misunderstand that theory.

In Part III we analyze the relationship of the enterprise liability theory to the economic analysis of tort law, a theoretical approach that came to prominence in the early 1970s—at the very time that the enterprise liability theory began its descent into obscurity. Ironically, the initial appeal of economic analysis derived from the appearance that it was supportive of the no-fault and strict liability agenda of the enterprise liability theory. As presented in the pioneering work of Guido Calabresi, economic analysis promised to provide a sophisticated new argument for the "nonfault" enterprise liability agenda.<sup>5</sup> Calabresi, however, expressly sought to distance that agenda from the "radical" loss spreading policy, substituting in its place the goal of efficient prevention of accidents.<sup>6</sup> He confidently wrote that his "modified enterprise liability approach . . . would give us better . . . deterrence than fault and as much compensation as we want."<sup>7</sup>

In fact, Calabresi's confidence was misplaced. During the 1970s it became increasingly clear, largely through the scholarship of Richard Posner, that the economic analysis that Calabresi popularized could not support the substantive agenda he favored. The efficiency goal, it turned out, is at best agnostic and at worst antagonistic toward the nonfault agenda that Calabresi (and the unmodified enterprise liability theory) favored.<sup>8</sup> By the end of the 1970s, economic analysis, now mostly deployed in defense of the fault system, was seen by many to be the dominant theory about the appropriate role of tort law, an achievement facilitated by Calabresi's downplaying of the enterprise liability goals of victim compensation and loss spreading as well as by the obscurity into which central tenets of that theory had fallen.

In Part IV, we assess the place of a properly understood (unmodified)

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<sup>5</sup> Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965) [hereinafter *The Decision*]; see also Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) [hereinafter *Some Thoughts*].

<sup>6</sup> See *The Decision*, *supra* note 5, at 745.

<sup>7</sup> *Id.*

<sup>8</sup> See Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 221 (1973); see also Guido Calabresi & Alvin K. Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585, 626 (1985) (need for empirically based reexamination); 1 REPORTERS' STUDY, *supra* note 3, at 263 ("efficient incentives for accident avoidance flow from either [strict liability or negligence] standards").

enterprise liability theory (encompassing both damages reform and no-fault principles) in contemporary tort theory. We point out that the perceived dominance of economic analysis is due to the relegation of no-fault to the realm of "alternatives to tort," thus beyond the domain of "tort" theory.<sup>9</sup> In recent years, however, no-fault proposals have drawn support across a broad scholarly and ideological spectrum.<sup>10</sup> Thus, once one recognizes no-fault as an aspect of a broader tort theory, the central position of the enterprise liability theory in modern tort law becomes clear. That recognition also opens up the possibility the courts can be a vehicle (perhaps the only viable vehicle, given the demonstrated power of special interests to paralyze the legislative process) to achieve the "promising blend of efficient compensation, economical administration, and effective prevention"<sup>11</sup> that is the hallmark of the properly understood enterprise liability theory.

We conclude this Article, in Part V, with concrete proposals, suitable for judicial implementation, that incorporate no-fault ideas to avoid problematic aspects of the strict products liability form of the enterprise liability theory—namely, the defect requirement and traditional damages rules. We demonstrate that courts, operating within the framework of our common law tradition, can create a tort law suitable for the twenty-first century.

## II. ENTERPRISE LIABILITY

### A. *The Theory and Its Successes*

Torts scholars are correct in their belief that strict products liability and other expansive tort developments of recent years derive from the enterprise liability theory. Their mistake is that they fail to recognize that these developments are merely one facet of that theory. The consequence of this failure of understanding is that the picture of the enterprise liability theory presented by torts scholars is, in fact, a caricature and a distortion of the theory of enterprise liability as understood and articulated by its proponents.

Although most scholars today appear unaware of the fact, compensation plans formed the centerpiece of early enterprise liability scholarship. Inspired by the enactment of workers' compensation plans, scholars such as Leon Green and Fleming James saw the evolution of employee accident law as "a pattern by which to indicate other developments either mature or now under way."<sup>12</sup>

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<sup>9</sup> See, e.g., 1 REPORTERS' STUDY, *supra* note 3, at 35 (no-fault as "alternative to tort").

<sup>10</sup> As discussed, *infra* Part IV, supporters include Stephen Sugarman (tort critic favoring social insurance), Gary Schwartz (previously sympathetic to negligence system), Peter Huber (tort critic favoring contract alternatives), and the 1991 *ALI Reporters' Study* (medical no-fault proposal). See 1 REPORTERS' STUDY, *supra* note 3.

<sup>11</sup> 2 REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 534 (American Law Institute, 1991) [hereinafter 2 REPORTERS' STUDY].

<sup>12</sup> Leon Green, *The Duty Problem in Negligence Cases: II, The Moral, Economic, Preventative and Justice Factors*, 29 COLUM. L. REV. 255, 270 (1929); see also VIRGINIA

For these scholars, the goal was to create "a more comprehensive and more adequate means of protection for all victims of personal injuries . . . without placing too heavy a burden on enterprise or any other segment of the social group."<sup>13</sup> To achieve this goal, they thus sought to supplant tort law and its requirement that victims prove negligence with legislatively enacted compensation plans tailored to discrete categories of accidents. Green, in 1929, for example, proposed compensation plans for railroad crossing accidents,<sup>14</sup> for children injured while trespassing on industrial premises,<sup>15</sup> and for automobile accidents.<sup>16</sup> The latter proposal foreshadowed the landmark 1932 *Columbia Study*, which concurred that tort law should be displaced in automobile accident cases.<sup>17</sup>

Only after it became clear that automobile compensation plan proposals had foundered on the legislative seas of special interest politics did enterprise liability advocates look seriously to courts and the common law to achieve their goal of victim compensation. It was not until the mid-1950s, for example, that James recognized the potential of strict products liability to achieve that goal.<sup>18</sup> In his previous scholarship,<sup>19</sup> James had appeared unaware of the potential of the strict products liability doctrine proposed by Justice Roger Traynor in his now famous 1944 concurrence in *Escola v. Coca Cola Bottling Co.*<sup>20</sup> Recognizing this potential in the mid-1950s, James enthusiastically endorsed the form of "strict enterprise liability"<sup>21</sup> that courts would soon embrace in products liability cases in the early 1960s. The 1960s also saw a major advance on the automobile compensation plan front with the 1965 publication of Robert Keeton and Jeffrey O'Connell's *Basic Protection for the Traffic Victim*.<sup>22</sup> That

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E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY 21-68 (1995).

<sup>13</sup> Leon Green, *The Individual's Protection Under Negligence Law: Risk Sharing*, 47 NW. U. L. REV. 751, 775 (1953).

<sup>14</sup> See Green, *supra* note 12, at 275-76.

<sup>15</sup> See *id.* at 272-74.

<sup>16</sup> See *id.* at 277-79.

<sup>17</sup> See COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, REPORT TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES (1932).

<sup>18</sup> See Fleming James, Jr., *Products Liability*, 34 TEX. L. REV. 44, 192 (1955).

<sup>19</sup> See Fleming James, Jr., *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365 (1946).

<sup>20</sup> 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring); see also *Trust v. Arden Farms Co.*, 324 P.2d 583, 595 (Cal. 1958) (Traynor, J., concurring and dissenting) (strict liability for harm caused by food containers); *Gordon v. Aztec Brewing Co.*, 203 P.2d 522, 532 (Cal. 1949) (Traynor, J., concurring) (reiterating his *Escola* proposal).

<sup>21</sup> Fleming James, Jr., *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923, 923 (1957).

<sup>22</sup> ROBERT E. KEETON & JEFFREY O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* (1965). For other important works focusing on the problem of the automobile accident, see ALFRED F. CONARD ET AL., *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* (1964); Clarence Morris & James C. N. Paul, *The*

work built on previous enterprise liability scholarship and found success with the flurry of legislative enactments of no-fault plans in the early 1970s.

Strict products liability and no-fault compensation plans, thus, are aspects of a broader enterprise liability theory, and they were recognized as such by their proponents. For example, James, the leading academic advocate of the application of "strict enterprise liability" in products cases,<sup>23</sup> hailed the automobile no-fault compensation plan proposed by Keeton and O'Connell as a promising new "statutory system[] of enterprise liability."<sup>24</sup> O'Connell similarly recognized auto no-fault and his own proposed extensions of no-fault insurance beyond auto accidents as a "form of tort liability called 'enterprise liability.'"<sup>25</sup>

Given the compensation plan origins of the enterprise liability theory, it should come as no surprise that damages reform was also an important (although today overlooked) aspect of that theory. Indeed, as enterprise liability proponents during the 1950s increasingly turned their focus from compensation plans to the common law, they also questioned the traditional common law damages award. The issue of damages reform was first raised in 1951 by Albert Ehrenzweig in the book in which he coined the term "enterprise liability."<sup>26</sup> Shortly thereafter, in 1953, Louis Jaffe spelled out in detail the damages implications of the movement toward liability based "on insurability rather than notions of fault."<sup>27</sup> Jaffe questioned both the collateral source rule and the award of damages for pain and suffering.<sup>28</sup> He also hinted at a provocative role for courts in damages reform, suggesting that "the award for pain and suffering might be measured and justified in terms of a contribution to the real costs of the litigation [that is, attorneys' fees]."<sup>29</sup> Jaffe's damages reform thesis quickly gained acceptance among enterprise liability scholars, including Green,<sup>30</sup> Traynor,<sup>31</sup> and James,<sup>32</sup> thus firmly establishing by the

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*Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962).

<sup>23</sup> See Priest, *supra* note 1, at 465.

<sup>24</sup> See Fleming James, Jr., *The Future of Negligence in Accident Law*, 53 VA. L. REV. 911, 916-17 (1967) (referring to KEETON & O'CONNELL, *supra* note 22).

<sup>25</sup> Jeffrey O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749, 773 (1973) [hereinafter *Expanding*]; see also JEFFREY O'CONNELL, *ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES* (1975) [hereinafter *INJURY*].

<sup>26</sup> See ALBERT A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951), reprinted in 54 CAL. L. REV. 1422, 1423 (1966) [hereinafter cited to CAL. L. REV.].

<sup>27</sup> Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 221 (1953).

<sup>28</sup> See *id.*

<sup>29</sup> *Id.* at 235.

<sup>30</sup> See LEON GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* (1958).

<sup>31</sup> See *Seffert v. Los Angeles Transit Lines*, 364 P.2d 337, 344 (Cal. 1961) (Traynor, J., dissenting).

<sup>32</sup> See Fleming James, Jr., *Damages in Accident Cases*, 41 CORNELL L.Q. 582, 584-85 (1956); see also FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* § 25 (1956).

early 1960s that damages reform is a central aspect of the enterprise liability theory. That theme, of course, is congruent with the approach of no-fault compensation plans, which provide for assured, but limited, compensation.

Not surprisingly, therefore, O'Connell picked up the damages reform theme in the late 1970s and early 1980s, proposing, among other things, the elimination of pain and suffering damages in return for a rule requiring a losing defendant to pay a victim's attorneys' fees and other costs of prosecuting the claim.<sup>33</sup> Furthermore, O'Connell argued that this and his other reforms could be implemented by common law decision.<sup>34</sup>

The theory of enterprise liability is thus far more nuanced and complex than is recognized by contemporary critics who depict its proponents as scholars who with "radical single-mindedness . . . promoted one principle—risk distribution—[and] ruthlessly devalued or ignored . . . [e]very other consideration that might be thought relevant to the resolution of a tort dispute."<sup>35</sup> The widely accepted caricature of scholars indifferent to concerns of cost and efficiency is flatly incorrect. For enterprise liability scholars, the goal was to achieve the sort of balanced reform embodied in workers' compensation plans—to extend the workers' compensation pattern to other accident settings both by legislative compensation plans and by judicially created tort doctrine. Their goal, as James wrote in 1959, was to "produce a prompt, widespread, and, above all, equitable distribution of payments in accident cases."<sup>36</sup>

### B. *The Fragmentation of the Enterprise Liability Theory*

With courts adopting and implementing strict products liability and no-fault auto insurance sweeping across the country, the enterprise liability theory dominated tort law during the 1960s and early 1970s. During these very years, however, the economic analysis of law began to emerge, and by the late 1970s economic efficiency and the prevention of injuries were seen as the proper goals of tort law. How economic analysis came to dominate tort theory is an important question whose answer will have important implications.

Ironically, the successes of the no-fault movement in the early 1970s paved the way for the embrace of economic analysis by torts scholars. The rapid legislative successes of no-fault auto insurance during this period produced a wave of optimism, much like the mood following the enactment of workers'

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<sup>33</sup> See Jeffrey O'Connell, *A Proposal to Abolish Contributory and Comparative Fault, with Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 U. ILL. L.F. 591 [hereinafter *Compensatory*]; Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333 [hereinafter *Payment*].

<sup>34</sup> *Compensatory*, *supra* note 33, at 605, *see also Expanding*, *supra* note 25, at 790 n.118, 825.

<sup>35</sup> Priest, *supra* note 1, at 470.

<sup>36</sup> Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408, 424 (1959).

compensation legislation, about the prospects for legislative reform and an examination of new areas in which tort law might be displaced by compensation plans. As the 1970s unfolded, Jeffrey O'Connell carried on the enterprise liability tradition. In 1973, for example, he proclaimed that "[n]o-fault auto insurance seems to have come of age. If so, no army of trial attorneys or timid insurance executives will be able to halt its progress."<sup>37</sup> Accordingly, he urged that it was time to turn "to more ambitious legislation, . . . time we turned away from the tortuous 'interstitial legislation' of the common law tort system."<sup>38</sup>

Scholars who favored the enterprise liability goal of victim compensation did shift their focus from the "interstitial legislation" of the common law to proposals for more sweeping legislative change in the form of no-fault compensation plans. This shift in focus away from the common law to the compensation plan version of enterprise liability during the 1970s had an important consequence. The enterprise liability theory first became fragmented and then, ultimately, lost its identity as a tort theory among torts scholars. In his 1973 proposal for expanding no-fault compensation beyond automobile insurance, O'Connell had forthrightly recognized that he was "creating a new form of tort liability called 'enterprise liability,'"<sup>39</sup> but the authors of later compensation plan proposals discarded that label. No-fault took on a life of its own and was no longer recognized as one aspect of the broader enterprise liability theory. In his 1979 book, *The Lawsuit Lottery*, for example, O'Connell proposed a system of elective first-party no-fault insurance but no longer linked no-fault to enterprise liability.<sup>40</sup> Indeed, the term "enterprise liability" is not mentioned in the book.<sup>41</sup>

The delinking of the compensation plan idea from the broader enterprise liability theory eventually had the important consequence of removing compensation plans from the realm of tort theory. No-fault came to be seen as an alternative to "tort," not as a theory about the proper configuration of tort (personal injury) law.<sup>42</sup> Moreover, as no-fault scholars criticized the tort law that their compensation plans were designed to replace, their analyses further obscured the enterprise liability theory. In 1973, Jeffrey O'Connell had succinctly reviewed the enterprise liability critique of the fault system. These criticisms included the "difficulties of establishing the fault of a defendant," the barrier of contributory fault, the "collateral source rule, which calls for . . . multiple payment," awards "for so-called pain and suffering . . . with the . . . result that those suffering pain the least are paid for it the most," and the overall indictment of a system that "squanders insurance dollars" because of

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<sup>37</sup> *Expanding*, *supra* note 25, at 749; *see also* INJURY, *supra* note 25.

<sup>38</sup> *Expanding*, *supra* note 25, at 771; *see also* INJURY, *supra* note 25.

<sup>39</sup> *Expanding*, *supra* note 25, at 773.

<sup>40</sup> *See* JEFFREY O'CONNELL, *THE LAWSUIT LOTTERY* 187 (1979).

<sup>41</sup> *See id.* at 262.

<sup>42</sup> *See, e.g.*, 1 REPORTERS' STUDY, *supra* note 3, at 35 (no-fault as "alternative to tort").

high administrative costs.<sup>43</sup> Although O'Connell expressly recognized that judicial lawmaking might remedy these flaws, later no-fault critiques by others failed to recognize the possibility of a common law remedy and assumed that "tort" law was "stuck with the administrative apparatus of [traditional] tort law [including its] rules of damages."<sup>44</sup> Indeed, no-fault insurance proponents railed against "tort" law without differentiating between traditional tort law (the proper villain) and the enterprise liability vision of tort law (which shared with compensation plans the goal of assured adequate compensation).

One consequence of these developments was that the enterprise liability critique of traditional tort law and damages rules was transformed into a critique of the enterprise liability view that the main goal of tort law should be assurance of adequate compensation. Scholars ignored the common law version of enterprise liability, especially its damages reform agenda, and commonly believed that "tort" law necessarily possessed "considerable flaws . . . as a device for expanding insurance protection against disabling injuries,"<sup>45</sup> despite the fact that these flaws were those of traditional tort law, not the enterprise liability alternative. By the late 1970s, it was widely believed that "the use of tort law as a device for expanding insurance protection against disabling injuries is . . . a questionable enterprise."<sup>46</sup> By then, the enterprise liability theory had become so obscured that it had virtually ceased to exist in the minds of tort scholars.<sup>47</sup>

During the period of the fragmentation (and obscuring) of the enterprise liability theory, economic analysis entered into the ongoing fray between the

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<sup>43</sup> *Expanding*, *supra* note 25, at 758-59.

<sup>44</sup> STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* 36 (1989); *see also* 1 REPORTERS' STUDY, *supra* note 3, at 30.

<sup>45</sup> 1 REPORTERS' STUDY, *supra* note 3, at 29-30; *see also* Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 316 (1990).

<sup>46</sup> 1 REPORTERS' STUDY, *supra* note 3, at 30.

<sup>47</sup> The "disappearance" of the enterprise liability theory can be seen in treatments of tort history that appeared in the early 1980s. For example, the term "enterprise liability" is not even listed in the index to G. Edward White's excellent book on tort history. *See* G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 279-83 (1980). Other scholars either failed to recognize the common law agenda of the enterprise liability scholars or lumped it together with "traditional tort scholarship—primarily concerned with the coherence and the clarification of tort doctrine." Gary T. Schwartz, *Foreword: Tort Scholarship*, 73 CAL. L. REV. 548, 548 (1985). Compensation plans, now seen as a legislative repudiation of tort, were either ignored in tort histories or treated largely as a product of the 1960s and the Keeton-O'Connell plan. O'Connell writes, for example, that "nowhere in Professor White's book [*Tort Law in America*] does he discuss workers' compensation . . . —like many torts scholars [he] completely ignores it." Jeffrey O'Connell, Book Review, 1980 DUKE L.J. 1201, 1208. Absent in these accounts was the unified theory of enterprise liability that, dating from Leon Green's seminal work in the 1920s, had challenged and defeated traditional tort theory, conceived and nurtured the compensation plan idea, provided the framework for the Keeton-O'Connell plan, and dominated personal injury law since the early 1960s.



scholars who favored the negligence system and those (enterprise liability) scholars who favored alternatives that better served the goal of assured adequate compensation. It should be emphasized at this point that despite the successes of the enterprise liability theory, it remained a very controversial way of looking at tort law, capable of generating strident opposition among scholars who clung to the traditional view that compensation should be linked to fault. These scholars cringed at the "specter of runaway social engineering with ill-considered emphasis on risk-spreading capacity,"<sup>48</sup> and they resisted "a sharp change in our system of compensation of accidental injuries, shifting from our present system with its premise of liability based on fault to a system based on a premise of loss distribution or insurance."<sup>49</sup>

Even as courts moved to adopt the strict products liability version of the enterprise liability theory, many—if not most—scholars remained uncomfortable with its radical implications. William Prosser, for example, was considered the repository of consensus thought in tort scholarship during the 1960s,<sup>50</sup> "serv[ing] as a litmus paper test of the permissible range of scholarly dispute."<sup>51</sup> Yet he characterized the major themes of enterprise liability as "too radical and disruptive" for implementation.<sup>52</sup>

The fact remained, however, that the premise of both strict products liability and the no-fault movement was that of the enterprise liability scholars—the assurance of adequate compensation to the victims of accidental injury. The rejection by courts and legislatures of the traditional view that linked liability to fault thus created a void in tort theory and placed scholars in a dilemma. If they opposed the radical implications of the loss spreading policy, how could that opposition be justified on other than "political" grounds? For a new generation of scholars, the answer to this question lay in a new approach to tort theory that emerged just as the enterprise liability theory assumed the center stage of tort scholarship in 1960. That approach was the economic analysis of law.

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<sup>48</sup> Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 444 (1959).

<sup>49</sup> Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 508 (1962).

<sup>50</sup> See WHITE, *supra* note 47, at 155.

<sup>51</sup> *Id.* at 163–64.

<sup>52</sup> William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120 (1960).

## III. THE ECONOMIC ANALYSIS OF TORT LAW

A. *The Emergence of (Calabresi's) Economic Analysis as an "Ally" of Enterprise Liability*

The economic analysis of tort law can be traced to the 1961 publication of Guido Calabresi's first tort article,<sup>53</sup> which appeared almost simultaneously with Ronald Coase's famous article, *The Problem of Social Cost*.<sup>54</sup> Calabresi began by stating his agreement with the statement in the recently published Gregory and Kalven torts casebook that "the central policy issue in tort law is whether the principal criterion of liability is to be based on individual fault or on a wide distribution of risk and loss."<sup>55</sup> Rather than take sides in this debate between traditional tort theory and enterprise liability, Calabresi offered an economic theory of tort law that was an alternative to both of these approaches. Economic analysis thus promised to fill the void created by the defeat of traditional tort theory, offering an alternative to the enterprise liability theory and its loss spreading premise.

Calabresi's economic analysis could be seen as a more sophisticated version of enterprise liability or, at least, as a closely allied theory of tort law. Indeed, in his early work Calabresi used the term "enterprise liability" to describe his own theory.<sup>56</sup> In addition, Calabresi explained and elaborated on the enterprise liability view of the desirability of loss spreading.<sup>57</sup> From the outset of his career, however, Calabresi sought to develop a theory distinct from that of the enterprise liability scholars, who, as Calabresi recognized, had "been concerned primarily with risk spreading."<sup>58</sup> Thus, in his 1961 article, Calabresi wrote that he was "less concerned with the risk spreading potential of enterprise liability than with whether another, more general, justification exists for the 'should' in the phrase 'an enterprise should bear its costs.'"<sup>59</sup> For Calabresi, that more general justification was provided by economic theory. Calabresi's economic theory could be seen to situate him as an ally of the enterprise liability scholars, however, since it supported their strict liability and compensation plan agenda.

For Calabresi, the more general justification for allocating accident costs to enterprises was the "'allocation of resources' justification."<sup>60</sup> According to

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<sup>53</sup> *Some Thoughts*, *supra* note 5.

<sup>54</sup> Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. ECON. 1 (1960); *see also* Guido Calabresi, Commentary, in Fred R. Shapiro, *The Most-Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449, 1482 n.108 (1991).

<sup>55</sup> *Some Thoughts*, *supra* note 5, at 499 (quoting CHARLES O. GREGORY & HARRY KALVEN, JR., CASES AND MATERIALS ON TORTS 689 (1959)).

<sup>56</sup> *See id.* at 518.

<sup>57</sup> *See id.* at 517-19.

<sup>58</sup> *Id.* at 530 (citing FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 1370-74 (1956)).

<sup>59</sup> *Id.* at 501.

<sup>60</sup> *Id.* at 501-02 (footnote omitted).

Calabresi, "the most desirable system of loss distribution under a strict resource-allocation theory is one in which the prices of goods accurately reflect their full cost to society."<sup>61</sup> To him this meant that we should move away from fault-based liability rules, that "the cost of injuries should be borne by the activities which caused them, whether or not fault is involved, because, either way, the injury is a real cost of those activities."<sup>62</sup>

In subsequent articles in the 1960s and in *The Costs of Accidents*,<sup>63</sup> Calabresi elaborated on this resource allocation rationale, which evolved into a theory of "'general deterrence' . . . as a guide to allocation of losses."<sup>64</sup> Under this approach, accident costs would be diminished "not by directly attacking specific occasions of danger, but (like workmen's compensation) by making more expensive those activities which are accident prone and thereby making more attractive their safer substitutes."<sup>65</sup> Calabresi utilized this theoretical approach during the 1960s to suggest a framework for nonfault liability that supported automobile compensation plans.<sup>66</sup> In a 1972 article, written with Jon T. Hirschoff, he deployed his economic analysis to support the emerging doctrine of strict products liability and to describe "a framework [for] defining the limits of strict liability in the areas of the law where it has come to dominate."<sup>67</sup> In this article, Calabresi argued that courts should impose liability on the party to an accident that was "in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made."<sup>68</sup> In his view, this approach would be more likely than the negligence test "to accomplish a satisfactory job of . . . accident cost optimization."<sup>69</sup>

Because of Calabresi's early use of the rhetoric of enterprise liability and his advocacy of nonfault liability rules, it was easy for scholars initially to view economic analysis as allied with the enterprise liability theory. In the 1968 supplement to the Harper and James treatise, for example, James saw Calabresi's theory, which "stress[ed] the need to have an enterprise pay its own accident costs in order to assure the proper allocation of limited resources, [as having] collateral advantages. It will tend to assure compensation for traffic victims and it will bring about a wide distribution of the costs of accidents."<sup>70</sup>

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<sup>61</sup> *Id.* at 505.

<sup>62</sup> *Id.*

<sup>63</sup> GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 54 (student ed. 1970).

<sup>64</sup> Guido Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216, 223 (1965).

<sup>65</sup> *Id.*

<sup>66</sup> See CALABRESI, *supra* note 63, at 313-18; see also *The Decision*, *supra* note 5.

<sup>67</sup> Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1084 (1972); see also Fred R. Shapiro, *supra* note 54, at 1501 (Calabresi discussing Calabresi & Hirschoff, *supra*).

<sup>68</sup> Calabresi & Hirschoff, *supra* note 67, at 1060 (emphasis omitted).

<sup>69</sup> *Id.* at 1059.

<sup>70</sup> HARPER & JAMES, *supra* note 32, at 4-5 (Supp. 1968) (quoting Fleming James, Jr.,

Similarly, in 1973, O'Connell wrote of "Calabresi's alluring idea that market deterrence is the best way for accident law to 'reduce the sum of the costs of accidents and the costs of avoiding accidents.'"<sup>71</sup> For O'Connell, "resource allocation [was] another justification for imposing no-fault liability on an enterprise."<sup>72</sup> For such scholars, Calabresi's analysis was appealing because it provided a sophisticated new argument in support of the enterprise liability agenda.

### B. *The Antagonism Between Calabresi's Economic Analysis and Enterprise Liability*

Calabresi's economic analysis, however, was offered as an alternative to the enterprise liability theory, and from the outset there was a fundamental antagonism between the two approaches. Indeed, Calabresi expressly rejected the view of "writers [with a footnote to Harper and James] who have been concerned primarily with risk spreading [and] have tended to view enterprise liability as, at best, a half way house on the road to social insurance."<sup>73</sup> Although he aligned himself with the compensation plan agenda of the enterprise liability scholars, Calabresi wrote that he proposed a "modified enterprise liability approach."<sup>74</sup> As Walter Blum and Harry Kalven noted at the time, Calabresi's "modified enterprise liability" was an explicit blend of "policy judgments [and] political predictions."<sup>75</sup> Calabresi wrote that "we are faced with the fact that a time-honored system (fault) fails to satisfy a modern demand (compensation)."<sup>76</sup> He characterized the debate as one between "'conservative' and 'radical' camps,"<sup>77</sup> and he expressly rejected the views of both traditional tort theorists and the "radical" enterprise liability scholars who had urged that "compensation [is] the main purpose of accident law."<sup>78</sup> Instead, Calabresi sought a "middle ground."<sup>79</sup>

In Calabresi's view, the fault system was "so unpalatable on compensation grounds that it would soon be replaced."<sup>80</sup> He feared that the "politically unstable" fault system would be replaced not by compensation plans but "by

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Book Review, 1966 UTAH L. REV. 297, 302-03).

<sup>71</sup> *Expanding*, *supra* note 25, at 766-67 (quoting CALABRESI, *supra* note 63, at 26).

<sup>72</sup> *Id.* at 778; *see also* Marc A. Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439, 462 (1972).

<sup>73</sup> *Some Thoughts*, *supra* note 5, at 530.

<sup>74</sup> *The Decision*, *supra* note 5, at 745.

<sup>75</sup> Walter J. Blum & Harry Kalven, Jr., *The Empty Cabinet of Dr. Calabresi—Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239, 272 n.74 (1967).

<sup>76</sup> *The Decision*, *supra* note 5, at 745.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 715.

<sup>79</sup> *See id.* at 745.

<sup>80</sup> *Id.* at 744; *see also* Blum & Kalven, *supra* note 75, at 243; Guido Calabresi, *Views and Overviews*, 1967 U. ILL. L.F. 600, 610-11.

social insurance in order to accomplish compensation.”<sup>81</sup> Guided by these political judgments, Calabresi presented his “modified enterprise liability,” which severed the compensation plan idea from its compensation and loss spreading premise and replaced that premise with the theory of general deterrence. In Calabresi’s view, the goal of victim compensation was dangerous because “if compensation were the only goal, then by far the most effective and efficient method of accomplishing it would be through a system of general social insurance.”<sup>82</sup> Such a system was undesirable, however, because it “would externalize the cost of accidents” and thus negate the goal of general deterrence.<sup>83</sup> Calabresi also believed that the compensation goal was superfluous because economic theory supported the displacement of traditional tort law with nonfault approaches in the form of compensation plans and strict liability. He was confident that his “modified enterprise liability approach . . . would give us better general deterrence than fault [or social insurance] and as much compensation as we want,”<sup>84</sup> while also derailing what he saw as a movement toward social insurance.<sup>85</sup>

Turning his attention to strict products liability in the 1970s, Calabresi argued that “the recent move to strict liability in torts could not be explained predominantly on . . . spreading grounds, as was commonly stated, but was likely to stem from dissatisfaction with the meager accomplishments of fault type tests in reducing the sum of accident and safety costs.”<sup>86</sup> He also questioned the “wisdom” and propriety of courts’ utilizing the loss spreading policy, writing that, even if loss spreading considerations were sound as a matter of social policy and thus appropriate for *legislative* implementation, “it does not follow that [they] are equally suited to being considered by courts or juries.”<sup>87</sup> Thus, for Calabresi, the loss spreading policy was dangerous and superfluous, had not been the policy underlying strict products liability, and was of questionable propriety for judicial implementation.

Calabresi’s rejection of the enterprise liability view that “compensation [is] the main purpose of accident law”<sup>88</sup> coincided with the previously discussed rejection by compensation plan advocates of compensation as a goal of “tort” law. Those scholars, it will be recalled, mistakenly equated tort law with traditional tort law and ignored the possibility of common law routes to the non-fault (enterprise liability) goal of assured adequate compensation.<sup>89</sup> For his part, Calabresi mistakenly transformed the enterprise liability view that compensation is the *main* purpose of accident law into the observation that “if compensation were the *only* goal, then by far the most effective and efficient

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<sup>81</sup> *The Decision*, *supra* note 5, at 744.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 745.

<sup>85</sup> *See id.*

<sup>86</sup> Calabresi, *supra* note 54, at 1501.

<sup>87</sup> Calabresi & Hirschhoff, *supra* note 67, at 1081.

<sup>88</sup> *The Decision*, *supra* note 5, at 715.

<sup>89</sup> *See discussion supra* Part II.

method of accomplishing it would be through a system of general social insurance."<sup>90</sup> For enterprise liability scholars, however, compensation was not the only goal of accident law; factors such as deterrence, administrative cost, and political feasibility could point to no-fault or strict liability alternatives to both fault and social insurance.<sup>91</sup> Unlike Calabresi, the enterprise liability scholars recognized that the strongest argument for such alternatives was the goal of victim compensation. From the viewpoint of the enterprise liability theory, it was a mistake to attempt to sever the strict liability and no-fault agenda from that goal. And that mistake was especially unfortunate, since the fault system would prove far more tenacious and the implications of economic analysis would prove far more ambiguous than Calabresi and other scholars assumed.

### C. *The Ascendancy of Economic Analysis and Its Opposition to the Enterprise Liability Agenda*

The antagonism between economic analysis and the enterprise liability theory went largely unnoticed during the 1960s because, as presented by Calabresi, economic analysis appeared to support the no-fault and strict liability agenda of enterprise liability. For Calabresi, it will be recalled, the problem with the fault system was that it "results in a deterrence of only faultily caused accidents."<sup>92</sup> If conduct "is not deemed careless, then a system based on fault . . . will have no effect whatever on this activity."<sup>93</sup> Based on this analysis, it was commonly believed, as Marc Franklin wrote in 1972, that strict liability could be justified on "safety incentive" grounds because if "forced to bear all accident costs, the businessman will have an incentive to find the optimal accident level for his product."<sup>94</sup>

During the 1970s, however, Richard Posner forcefully challenged the view that economic analysis pointed to strict liability. He noted that the negligence

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<sup>90</sup> *The Decision*, *supra* note 5, at 744 (emphasis added).

<sup>91</sup> See EHRENZWEIG, *supra* note 26, at 1450-55 (strict liability); KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 341-42 (1930) (strict products liability); SUGARMAN, *supra* note 44, at xviii, 3 (social insurance and expanded employee benefit plans; skepticism about deterrent effect of tort law); Albert A. Ehrenzweig, "Full Aid" Insurance for the Traffic Victim—A Voluntary Compensation Plan, 43 CAL. L. REV. 1, 24-48 (1955) (automobile compensation plan); Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967) (social insurance with safety incentives); James, *supra* note 21, at 924 (strict products liability); James, *supra* note 36, at 413 (automobile compensation plans); Karl N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 704 (1936) (strict products liability); *Expanding*, *supra* note 25, at 771 (no-fault); Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366-76 (1965) (strict liability, compensation plans).

<sup>92</sup> *The Decision*, *supra* note 5, at 720.

<sup>93</sup> *Id.* at 719 (footnote omitted).

<sup>94</sup> Franklin, *supra* note 72, at 462 (footnote omitted).

(Learned Hand) test imposes liability only when the potential accident cost exceeds the cost of avoiding an accident. He conceded that if the accident cost does not exceed the avoidance cost, the defendant would not be liable and "will have no incentive to adopt preventive measures."<sup>95</sup> Posner's point, however, was that under a strict liability rule, the defendant, although liable, "would have no incentive to adopt precautions; it would prefer to pay a judgment cost that by hypothesis would be lower than the cost of the precautions."<sup>96</sup> In other words, contrary to the assumption of many, economic theory indicated that a negligence rule would induce the same level of safety as strict liability. Posner thus concluded that economic analysis failed to establish any reason to move toward a regime of strict liability rules.<sup>97</sup> And although Calabresi countered that in practice, as opposed to theory, strict liability better optimized accident costs,<sup>98</sup> Posner's retort was that Calabresi had established only that the "question whether a general substitution of strict for negligence liability would improve efficiency [is] at this stage hopelessly conjectural; the question is at bottom empirical and the empirical work has not been done."<sup>99</sup> Posner thus concluded that "[e]conomic theory provides no basis, in general, for preferring strict liability to negligence, or negligence to strict liability. . . . Empirical data might enable us to move beyond agnosticism but we do not have any."<sup>100</sup>

If, as Posner argued, the deterrence goal provided no basis for preferring strict liability to negligence, the enterprise liability theory did: strict liability would provide an assurance of adequate compensation for victims of nonnegligent accidents. During the 1970s, however, a revolution had occurred in tort theory. At the start of the decade the enterprise liability theory had stood at the forefront of tort theory, as strict products liability and no-fault auto compensation plans achieved striking successes in courts and legislatures. As we have discussed, however, the no-fault movement quickly took on a life of its own as an alternative to "tort"—as opposed to a component of a broader (enterprise liability) theory about the proper configuration of tort (personal injury) law. Indeed, by the late 1970s the enterprise liability had become obscured to the point that it had virtually disappeared from the scholarly consciousness. Thus, advocates of compensation plans often painted with a

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<sup>95</sup> Posner, *supra* note 8, at 206.

<sup>96</sup> *Id.* at 207 n.6.

<sup>97</sup> *See id.* at 220–21.

<sup>98</sup> *See* Calabresi & Hirschhoff, *supra* note 67, at 1059.

<sup>99</sup> Posner, *supra* note 8, at 211–12.

<sup>100</sup> *Id.* at 221; *see* 1 REPORTERS' STUDY, *supra* note 3, at 263 ("efficient incentives for accident avoidance flow from either [strict liability or negligence] standards"); Calabresi & Klevorick, *supra* note 8, at 626 (need for empirically based reexamination); John P. Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973) (both negligence and strict liability with contributory fault defense lead to optimal levels of safety). As subsequently pointed out by Steven Shavell, the issue is more complicated than had been assumed because the number of accidents is a function not only of the level of care but also of the amount of an activity that takes place—the activity level. *See* Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

broad brush, attributing to "tort" the flaws of traditional tort law. Having overlooked the common law agenda of enterprise liability, which included damages reform, these advocates questioned compensation as a goal for "tort," even as they pursued it in their compensation plan proposals.

These developments coincided with Calabresi's rejection (for different reasons) of the enterprise liability view that "compensation [is] the main purpose of accident law."<sup>101</sup> Calabresi turned away from the "radical"<sup>102</sup> loss spreading policy in favor of a "more general[ ] justification"<sup>103</sup> for nonfault liability rules. However, contrary to the initial suggestion of Calabresi's pioneering work, the more general justification—economic analysis—failed to provide the promised safe "middle ground"<sup>104</sup> that could support the nonfault alternatives to negligence law that Calabresi favored. Although scholars could still argue that strict liability is superior to negligence on economic grounds<sup>105</sup> and no-fault (first- or third-party) could be defended on economic grounds,<sup>106</sup> those arguments lacked the certainty and forcefulness that they had appeared to possess in the 1960s.

#### IV. ENTERPRISE LIABILITY AND CONTEMPORARY TORT THEORY

##### A. *The Appropriate Goal of Personal Injury Law*

By the time that the no-fault movement came to a standstill in the late 1970s, a revolution in tort theory had occurred, with economic analysis capturing the central position held a decade earlier by the enterprise liability theory. Indeed, the enterprise liability theory was in a shambles. Its common law version, which linked the assurance of compensation with limitations on damages, was virtually forgotten. No-fault insurance, in turn, was seen as an alternative to tort, rather than an aspect of a broader (enterprise liability) theory of tort law.

The state of contemporary tort theory was well captured in 1991 by the American Law Institute's massive two-volume *Reporters' Study on Enterprise Responsibility for Personal Injury*, the product of a five-year collaboration by fourteen distinguished scholars.<sup>107</sup> According to that study, the consensus among torts scholars by the late 1970s was that "the use of tort law as a device for expanding insurance protection against disabling injuries is . . . a

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<sup>101</sup> *The Decision*, *supra* note 5, at 715.

<sup>102</sup> *Id.* at 745.

<sup>103</sup> *Some Thoughts*, *supra* note 5, at 501.

<sup>104</sup> *See The Decision*, *supra* note 5, at 745.

<sup>105</sup> *See, e.g., 2 REPORTERS' STUDY*, *supra* note 11, at 508. For a spirited defense of absolute manufacturer liability on economic grounds, see Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993).

<sup>106</sup> *See* Guido Calabresi, *First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them?*, 69 IOWA L. REV. 833 (1984).

<sup>107</sup> 1 REPORTERS' STUDY, *supra* note 3.



questionable enterprise.”<sup>108</sup> Economic analysis, focused on “liability incentives for the prevention of future injuries,” in turn was seen as “the generally prevailing scholarly theory about the appropriate role of tort law.”<sup>109</sup>

The consensus among torts scholars was that “efficient incentives for accident avoidance flow from either [strict liability or negligence] standards.”<sup>110</sup> “[R]ooted . . . in the approaches and techniques of contemporary legal scholarship,”<sup>111</sup> the *Reporters’ Study* reflects the contours of modern tort theory, confirming the success of economic analysis in displacing the enterprise liability theory.

Yet, as we have demonstrated, the approaches and techniques of contemporary legal scholarship—including the *Reporters’ Study*—are fundamentally flawed in their (mis)understanding of the enterprise liability theory. Thus, the *Reporters’ Study* statement of the “appropriate role of tort law” defines “tort” to exclude no-fault compensation plans and to include the traditional damages award that enterprise liability scholars had criticized.<sup>112</sup> Yet both no-fault and damages reform were, for enterprise liability advocates, central aspects of their theory, which defined the proper configuration of tort (personal injury) law.

Paradoxically—and unwittingly—the *Reporters’ Study* supports the view that the enterprise liability theory is once again emerging as the generally prevailing scholarly theory about the appropriate role of tort law. That study, for example, endorses damages reforms that resemble those proposed by enterprise liability scholars.<sup>113</sup> More fundamentally, when the study broadens its focus from tort law (narrowly defined) to personal injury law generally, one finds an endorsement of no-fault compensation plans, which are seen to provide a “promising blend of efficient compensation, economical administration, and effective prevention” of accidents.<sup>114</sup> Building on the workers’ compensation (third-party liability) model, the study proposes an inventive no-fault compensation plan for persons injured during medical treatment.<sup>115</sup> The study thus follows the enterprise liability tradition of extending the workers’ compensation “pattern” to new accident settings. Indeed, the study endorses “Jeffrey O’Connell’s idea of elective no-fault as a possible way to [bring its medical no-fault] on stream,”<sup>116</sup> thus demonstrating that its proposal is a derivative of O’Connell’s elective no-fault proposals of the 1970s and 1980s and an implementation of the enterprise liability theory.

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<sup>108</sup> *Id.* at 30.

<sup>109</sup> *Id.* at 31–32.

<sup>110</sup> *Id.* at 263.

<sup>111</sup> Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163, 1208 (1992).

<sup>112</sup> 1 REPORTERS’ STUDY, *supra* note 3, at 23–30; *see also id.* at 35 (no-fault seen as “alternative to tort”).

<sup>113</sup> *See* 2 REPORTERS’ STUDY, *supra* note 11, at 19–24 (damages proposals).

<sup>114</sup> *Id.* at 534.

<sup>115</sup> *See id.* at 487–516.

<sup>116</sup> *Id.* at 513.

The *Reporters' Study* can be faulted—indeed O'Connell has faulted it<sup>117</sup>—for its failure to propose further extensions of the workers' compensation model. That failure, however, is due to the study's focus on product accidents and its conclusion (which O'Connell questions) that the application of no-fault liability to manufacturers is problematical. What is impressive is the endorsement by the fourteen Reporters of the "promising blend of efficient compensation, economical administration, and efficient [accident] prevention" provided by the workers' compensation model.<sup>118</sup> Taken as a whole, the *Reporters' Study* supports the conclusion of Mark Rahdert's recent book on insurance and tort law: while the attractiveness of the workers' compensation model is apparent, the difficulty is "to find zones of human activity beyond the workplace where such an approach might work."<sup>119</sup> That, of course, was the goal of enterprise liability scholars such as Leon Green. The *Reporters' Study* thus is an endorsement of the enterprise liability theory as put forth by its proponents.

Indeed, the *Reporters' Study* is symptomatic of the widespread appeal of the workers' compensation (enterprise liability) model across the academic and political spectrum. Stephen Sugarman, for example, believes it is "unlikely" that tort law provides significant deterrence of accidents,<sup>120</sup> and he favors replacing tort law with a system of social insurance and expanded employee benefit plans.<sup>121</sup> Yet Sugarman also favors no-fault alternatives to tort, including the *Reporters' Study* medical no-fault proposal.<sup>122</sup> Sugarman recommends a "series of such schemes focusing on the seriously injured—say, for victims of medical accidents, airplane accidents, prescription drug and vaccine side-effects [and] organized recreational sporting accidents."<sup>123</sup>

In contrast to Sugarman, Gary Schwartz has long been sympathetic to the negligence system,<sup>124</sup> and he believes that tort law provides a moderate amount of accident deterrence (although not as much as most economic analysts assume).<sup>125</sup> Yet Schwartz appears to join Sugarman in endorsing compensation plans based on the third-party liability model (workers' compensation is his example). He writes that "the division of liability affected by workers'

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<sup>117</sup> See Jeffrey O'Connell & Chad M. Oldfather, *A Lost Opportunity: A Review of the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 307 (1993).

<sup>118</sup> 2 REPORTERS' STUDY, *supra* note 11, at 534.

<sup>119</sup> MARK C. RAHDERT, COVERING ACCIDENT COSTS: INSURANCE, LIABILITY, AND TORT REFORM 182 (1995).

<sup>120</sup> See SUGARMAN, *supra* note 44, at 23.

<sup>121</sup> See *id.* at xviii.

<sup>122</sup> See Stephen D. Sugarman, *Doctor No*, 58 U. CHI. L. REV. 1499, 1524 (1991) (reviewing PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* (1991)).

<sup>123</sup> *Id.* at 1525.

<sup>124</sup> See Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981) (sympathetic toward negligence law).

<sup>125</sup> See Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 423 (1994).

compensation . . . may achieve about as much by way of deterrence as any other liability regime."<sup>126</sup> And he adds that the worker compensation approach "eliminates the need to expensively litigate issues such as negligence and contributory negligence. Also, it satisfies injured workers' basic insurance needs."<sup>127</sup>

Further across the ideological spectrum is Peter Huber, a strident conservative critic of modern tort law and an avowed advocate of a "rediscovered respect for contract."<sup>128</sup> Huber, however, also emerges as a proponent of no-fault (enterprise) liability in the form of O'Connell-inspired "neo-no-fault" schemes in which compensation "is severed from questions of negligence, defect or fault" and under which benefits would "not include open-ended damages for pain and suffering."<sup>129</sup> Huber would adapt contract law to prescribe how "reasonable compensation for well-defined contingencies could best be expedited."<sup>130</sup> Reminiscent of Leon Green, who thought the "possibilities [were] many"<sup>131</sup> for areas in which compensation plans might displace tort, Huber writes that there are "many possible arrangements," and he suggests the application of no-fault principles to airline crashes,<sup>132</sup> as well as "lawn mowers, drugs, medical care, and countless other goods and services."<sup>133</sup>

A similar range of support can be found for automobile no-fault plans—despite their being held hostage since the mid-1970s by special interest politics. An "early and influential legislative supporter of no-fault insurance" in Massachusetts, the first state to enact an auto no-fault plan, was Michael Dukakis who later was to be George Bush's 1988 opponent for the presidency.<sup>134</sup> In his 1992 bid for re-election, President Bush made an O'Connell-inspired no-fault insurance proposal a facet of his campaign, proposing federal legislation that would require states to give drivers an elective no-fault option.<sup>135</sup> Also, auto no-fault has been championed by the conservative Manhattan Institute, as well as by persons whose ties have been to the Consumer Movement.<sup>136</sup>

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<sup>126</sup> *Id.* at 430.

<sup>127</sup> *Id.* at n.261.

<sup>128</sup> PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 203 (1988).

<sup>129</sup> *Id.* at 194, 196.

<sup>130</sup> *Id.* at 194.

<sup>131</sup> Green, *supra* note 12, at 270.

<sup>132</sup> HUBER, *supra* note 128, at 194.

<sup>133</sup> *Id.* at 197.

<sup>134</sup> See O'CONNELL, *supra* note 40, at 209.

<sup>135</sup> See Peter Passell, *Bush's Bold Plan for Car Insurance*, N.Y. TIMES, Oct. 17, 1992, at A41.

<sup>136</sup> See *id.*; Michael Johnson et al., *A New, No-Fault Road Map to Auto Insurance Reform*, L.A. TIMES, June 5, 1995, at B5.

## B. Understanding and Implementing the Enterprise Liability Theory

If we are correct that a broad spectrum of informed scholarly, and other, opinion would favor the sort of no-fault alternatives to traditional tort law endorsed by Sugarman, Schwartz, Huber, Rahdert, and the fourteen American Law Institute (ALI) Reporters, then the misunderstanding of the enterprise liability theory by contemporary torts scholars is especially unfortunate. Because they fail to recognize no-fault as a branch of a broader enterprise liability theory relating to the proper configuration of tort (personal injury) law, these scholars limit the role of "tort" law to the creation of "liability incentives for the prevention of future injuries."<sup>137</sup> Negligence law may achieve this goal (as does strict liability), but no one would claim that negligence law also gives the "promising blend of efficient compensation [and] economical administration"<sup>138</sup> that no-fault provides in addition to effective accident prevention. Because contemporary scholars give up the quest for this (enterprise liability) blend of goals, tort law and tort theory are impoverished.

These scholars assume that courts are incapable of creating a system of personal injury law that incorporates the insights of compensation plan scholarship. The ALI Reporters and others assume, for example, that courts are "stuck with the administrative apparatus of tort law [and its traditional] rules of damages."<sup>139</sup> They overlook the fact that no-fault compensation plans and damages reform are a *product* of the enterprise liability theory, which sought a system of personal injury law that provides the assurance of adequate (but not undue) compensation.

By ignoring the possibility of courts creating a balanced system of enterprise (no-fault) liability, contemporary scholars are left with legislatures as the focus of their reform efforts. In our view, this is a profound mistake. Desirable as no-fault may be, with the exception of workers' compensation and the flurry of auto no-fault enactments in the early 1970s, no-fault proposals have been blocked throughout this century by the clash of special interests that has paralyzed the legislative process.

In this regard the fate of the *Reporters' Study* is instructive. While O'Connell registered his disappointment over the meager no-fault agenda of the study,<sup>140</sup> the study's proposals apparently were too radical for its sponsor, the ALI. To the great dismay of its authors, the ALI did not even bring the *Reporters' Study* to the floor for a vote, much less endorse its recommendations.<sup>141</sup> In a recent symposium assessing the *Reporters' Study*, three of the Reporters, including Chief Reporter Paul Weiler, wrote that "after listening to intense exchanges between members of the plaintiff and defense

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<sup>137</sup> 1 REPORTERS' STUDY, *supra* note 3, at 31.

<sup>138</sup> 2 REPORTERS' STUDY, *supra* note 11, at 534.

<sup>139</sup> SUGARMAN, *supra* note 44, at 36; *see also* 1 REPORTERS' STUDY, *supra* note 3, at 30.

<sup>140</sup> *See* O'Connell & Oldfather, *supra* note 117, at 329.

<sup>141</sup> Note from the Editors, *The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 371, 371 (1993).

bars at its annual meeting in 1991, the ALI's Council decided to duck the fundamental policy questions we had raised about reforming tort litigation."<sup>142</sup> Instead, the ALI decided to devote its resources to a *Restatement (Third) of Products Liability*.<sup>143</sup> The Reporters editorialize that if "an organization like the [ALI] could be paralyzed by internal divisions . . . one cannot help wondering whether even more substantial reforms [along the lines urged by O'Connell] have any chance of adoption in the current climate."<sup>144</sup>

The Reporters' pessimism over the prospects for legislative reform is supported by events in California in the late 1980s. In California, as in many states, auto no-fault plans have for years been blocked by the plaintiffs' bar.<sup>145</sup> The stalemate over no-fault, however, is part of a broader phenomenon in which powerful interests, including insurers, hospitals, doctors, municipal governments, manufacturers, consumers groups, and trial lawyers have brought the legislative process to a standstill. As a consequence, in the 1980s, these groups shifted their efforts to the initiative process.<sup>146</sup> In the fall of 1988, for example, voters faced a dizzying array of competing tort reform, no-fault, and insurance reform ballot initiatives put forward by the insurance industry, plaintiffs' lawyers, and consumer groups.<sup>147</sup> The battle of the initiatives cost \$83 million—an "orgy of spending" that exceeded "the entire 1984 presidential election cost."<sup>148</sup> These events indicate a legislative process paralyzed by the clash of well-financed special interest groups and bode ill for the legislative enactment of any form of enterprise liability.

The legislative stalemate in California and the fate of the *ALI Reporters' Study* demonstrate, once again, that it is a fundamental mistake to assume that carefully crafted academic proposals for comprehensive alternatives to tort will necessarily achieve legislative success. In the 1950s, James asked one "final question[:] whether we would be better served in the long run by a process of common law development . . . than by a compensation scheme."<sup>149</sup> Answering this question in terms of the ideal, James concluded that "[u]nless it can be shown that common law development can produce a prompt, widespread, and, above all, equitable distribution of payments in accident cases, it should be

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<sup>142</sup> Kenneth S. Abraham et al., *Enterprise Responsibility for Personal Injury: Further Reflections*, 30 SAN DIEGO L. REV. 333, 333 (1993). See generally Symposium, *Perspectives on the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 213 (1993).

<sup>143</sup> See Abraham, *supra* note 142, at 347 n.30.

<sup>144</sup> *Id.* at 364.

<sup>145</sup> See Reynolds Holding, *High Stakes Battle Over No-Fault*, SAN FRANCISCO CHRONICLE, July 9, 1991, at A1.

<sup>146</sup> See Stephen D. Sugarman, *California's Insurance Regulation Revolution: The First Two Years of Proposition 103*, 27 SAN DIEGO L. REV. 683, 683 (1990).

<sup>147</sup> See *id.* at 687-91.

<sup>148</sup> *A Crying, Lying Shame*, L.A. TIMES, Nov. 7, 1988, at B4; see also Kenneth Reich, *Insurance Fight Cost Initiative Backers a Total of \$83.9 Million*, L.A. TIMES, Feb. 7, 1989, at A3.

<sup>149</sup> James, *supra* note 36, at 424.

replaced by a statutory scheme of compensation for automobile accidents.”<sup>150</sup>

Similarly, Green wrote that an ideal solution to the accident compensation problem would require “[s]omething more than merely polishing up the common law techniques.”<sup>151</sup> But, as the fate of the Columbia Plan and the Keeton-O’Connell efforts demonstrates, we live in a political, not an ideal, world. Each of these efforts was a model for responsible tort reform—a comprehensive scholarly examination of a discrete problem followed by a concrete legislative proposal. Moreover, Keeton and O’Connell expressly sought to infuse their proposal with political insights derived from the failure of the Columbia Plan. Today, however, even sympathetic observers note that the no-fault movement has been stalled for two decades, and that most of the adopted plans “are far from [the] ideal . . . . In all too many places, no-fault benefits are meager in amount, and worse, hardly any tort law has actually been displaced.”<sup>152</sup> Thus, in fact, as opposed to theory, the no-fault movement has failed to produce prompt, widespread, and equitable distribution of payments in the bulk of the nation’s automobile accidents, let alone in the broader array of situations envisioned by the enterprise liability theory. Today one could ask: unless it can be shown that legislative compensation plans have political viability, should not courts and scholars explore common law routes to assure prompt, widespread, and above all, equitable distribution of payments in accidental injury cases?

## V. COMMON LAW ROUTES TO ENTERPRISE (NO-FAULT) LIABILITY

Given the troubled prospects for more comprehensive legislative reform, it is time, in our view, once again to seriously consider the common law route to the goals of enterprise liability. In doing so, it is important to recall the compensation plan origins of the enterprise liability theory. The goal should be to incorporate insights of the no-fault compensation plans in order to avoid the problematic aspects of the strict products liability form of the enterprise liability theory, namely the defect requirement and traditional damages rules. As we have discussed, damages reform was an (uncompleted) aspect of the enterprise liability agenda. Thus, to craft a common law version of the enterprise liability theory, courts should reexamine the traditional damages award, as they create common law rules that dispense with the defect requirement.

Once one recognizes the compensation plan origins of the enterprise liability theory, it becomes apparent that the defect requirement is not integral to the enterprise liability theory and, in fact, is an impediment to the achievement of the goals of that theory. In fact, early in the history of strict products liability, Justice Traynor advised that the “complications surrounding the definition of defect suggest inquiry as to whether defectiveness is the

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<sup>150</sup> *Id.* (footnote omitted).

<sup>151</sup> Green, *supra* note 13, at 775.

<sup>152</sup> Stephen D. Sugarman, *Foreword: Choosing Among Systems of Auto Insurance for Personal Injury*, 26 SAN DIEGO L. REV. 977, 977 (1989).

appropriate touchstone of liability.”<sup>153</sup> In our view, it is time for courts to explore the possibility of a strict liability that does not require defectiveness as a prerequisite to victim compensation.

We are mindful that Professors Henderson and Twerski, Reporters for the *Restatement (Third) of Products Liability*, have recently asserted that the “abandonment of the traditional defect requirement . . . is one significant step in the evolution of American products liability that our courts will never take.”<sup>154</sup> They point to the fact that in many accidents more than one product is causally involved. This raises the problem of how to allocate liability among automobile, truck, bicycle, and telephone pole manufacturers in an accident involving all of these products.<sup>155</sup> The enterprise liability answer is that Henderson, Twerski, and others focus too narrowly on the existing doctrine of strict products liability. A broader focus would reveal that courts can craft a common law enterprise liability that eliminates the defect requirement, while also avoiding the multiple-product problem. In fact, two distinct doctrinal sources are available for use by courts in creating a new enterprise liability.

First, the strict products liability doctrine has been applied to business premises whose activities fall within the “license to use” and “hybrid sales-service” categories of strict products liability.<sup>156</sup> Thus, strict liability applies to a laundromat whose washing machine malfunctions<sup>157</sup> or to a beauty parlor that applies a defective permanent wave solution to a patron.<sup>158</sup> It would seem a small step to apply a broader business premises strict liability to cases that fail to fit precisely into the “license to use” and “hybrid sales-service” categories. Thus, courts could easily recognize a doctrine of business premises enterprise liability, applicable to persons injured on the premises of supermarkets and laundromats, as well as department stores, restaurants, and similar establishments. In contrast to strict products liability and previous proposals to extend “strict” liability, victim compensation under our proposed doctrine would not turn on whether an enterprise’s premises could be characterized as “dangerously defective.” Instead, the proposed doctrine would impose a strict enterprise liability for personal injuries *arising out of* the use of business premises by entrants on those premises.

A second doctrinal source for a new enterprise liability, the hazardous activity strict liability doctrine, already dispenses with the defect requirement. The growth of this doctrine has been inhibited by the *Restatement of Torts* and the *Restatement (Second) of Torts*, which preclude the application of strict

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<sup>153</sup> Traynor, *supra* note 91, at 372.

<sup>154</sup> James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1329–30 (1991).

<sup>155</sup> *See id.* at 1280.

<sup>156</sup> *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 719 (5th ed. 1984).

<sup>157</sup> *See* Garcia v. Halsett, 82 Cal. Rptr. 420 (Ct. App. 1970).

<sup>158</sup> *See* Newmark v. Gimbel’s, Inc., 258 A.2d 697 (N.J. 1969).

liability to hazardous activities that are "a matter of common usage."<sup>159</sup> Nevertheless, courts have increasingly ignored this criterion while imposing strict liability on such diverse (and common) activities as oil drilling,<sup>160</sup> fumigation,<sup>161</sup> crop dusting,<sup>162</sup> hauling of fuel by tanker trucks,<sup>163</sup> and the storage of gasoline by service stations in underground tanks<sup>164</sup>—activities that create hazards unlike those routinely created by individual citizens pursuing their everyday activities.<sup>165</sup>

This case law could easily provide the precedent for a broader enterprise liability. Courts, for example, might impose strict liability on railroads for injuries occurring when trains collide with persons or vehicles at crossings or elsewhere and when train derailments cause injuries to passengers or bystanders. In *Siegler v. Kuhlman*, the Washington Supreme Court applied strict liability to a trucker whose gasoline trailer overturned and exploded.<sup>166</sup> It would be no stretch to move from *Siegler* to railroad strict liability. Indeed, railroading clearly meets the criterion for liability that is emerging in the case law. Like the commercial hauling of fuel, railroading creates hazards unlike those routinely created by individual citizens pursuing their everyday activities.<sup>167</sup>

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<sup>159</sup> RESTATEMENT OF TORTS § 520(b) (1938); RESTATEMENT (SECOND) OF TORTS § 520(d) (1977).

<sup>160</sup> See *Green v. General Petroleum Corp.*, 270 P. 952 (Cal. 1928).

<sup>161</sup> See *Luthringer v. Moore*, 190 P.2d 1, 6-8 (Cal. 1948).

<sup>162</sup> See *Loe v. Lenhardt*, 362 P.2d 312 (Or. 1961); *Langan v. Valicopters, Inc.*, 567 P.2d 218 (Wash. 1977).

<sup>163</sup> See *Siegler v. Kuhlman*, 502 P.2d 1181 (Wash. 1972).

<sup>164</sup> See *City of Northglenn v. Chevron U.S.A., Inc.*, 519 F. Supp. 515 (D. Colo. 1981).

<sup>165</sup> See Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 299 (1987). Courts have rejected the Restatement's restrictions on strict liability and have articulated their own criteria to guide future applications of strict liability to hazardous activities. They have considered the loss spreading capacity of the enterprise and whether the activity is a "commercial hazard" when applying strict liability to hazardous activities. See *id.*

<sup>166</sup> See *Siegler*, 502 P.2d at 1181.

<sup>167</sup> One reason for our selection of business premises and railway accidents is that we believe that no-fault enterprise liability can be readily adapted to these factual contexts. Far more complex issues arise in toxic, environmental, and mass torts; and Jeffrey O'Connell has recently cautioned that it "puts the cart before the horse . . . to tackle [these] . . . incalculably more complex and unknowable" problems, as opposed to the problems posed by "simple traumatic injuries such as those from malfunctioning products." O'Connell & Oldfather, *supra* note 140, at 328. Also, business premises and railway accidents are unlikely to be the source of "outrageous misconduct" that could justify calling forth the expensive and complex machinery of traditional tort law to unearth the sort of misconduct that characterized the asbestos industry. See David Rosenberg, *The Dusting of America: The Story of Asbestos—Carnage, Cover-Up, and Litigation*, 99 HARV. L. REV. 1693 (1986) (reviewing PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985)). These accident settings are, in short, more akin to routine traffic accidents than to toxic, environmental, or mass torts—or even to injuries occurring



Because defectiveness is not a prerequisite to compensation, each of our proposed versions of enterprise liability avoids the "nettlesome" problems associated with the defect requirement of strict products liability.<sup>168</sup> Moreover, our proposed doctrines also avoid the multiple product problem. Like workers' compensation plans and auto no-fault, they look to the specified activity or locus of the accident to allocate no-fault enterprise liability. The owners of a railroad or a supermarket (or their insurer), for example, would compensate a person injured even if several products are causally related to the injury.

Business premises and railway accidents may be a more fertile ground for a no-fault enterprise liability than products cases for another reason. In explaining its hesitancy to extend no-fault to consumer products (at least outside such specialized situations as prescription drugs), the *ALI Reporters' Study* warns that there is

a crucial difference between the consumer product situation and the workplace and health care settings . . . . In the latter contexts, the employer or the hospital that is made liable has ample control over the circumstances giving rise to the injury and is able to investigate quickly both the causes and effects of any injuries that occur.<sup>169</sup>

In the product context, in contrast, once a product has "left the hands of the manufacturer, the consumer is in control . . . and is unconstrained . . . by the manufacturer . . . in the risky use . . . of the product."<sup>170</sup> Furthermore, "the manufacturer has no ability to investigate what kinds or causes of injuries may have occurred until compensation claims are filed much later."<sup>171</sup> Business premises and railway accidents are suitable for the application of no-fault principles because, like the workplace and health care situations, the business or railroad has "control over the circumstances giving rise to the injury and is able to investigate quickly both the causes and effects of any accidents that occur."<sup>172</sup>

Since our proposed doctrines are cast in a no-fault mode, it would also make sense to eliminate defenses based on victim fault. The early enterprise liability precedent for eliminating these defenses is, of course, workers' compensation; and the inappropriateness of these defenses was recognized by

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during medical treatment. It should also be noted that the adoption of an enterprise liability approach would not necessarily preclude the retention of a residual cause of action for what Ehrenzweig called "reprehensible conduct," under which traditional damages would be awarded. See EHRENZWEIG, *supra* note 26, at 1428. Once adopted, these doctrines could, of course, serve as a "pattern," Green, *supra* note 12, at 270, for other applications of the enterprise liability principle.

<sup>168</sup> See JOSEPH A. PAGE, *THE LAW OF PREMISES LIABILITY*, § 6.9, at 142 (2d ed. 1988).

<sup>169</sup> 2 REPORTERS' STUDY, *supra* note 11, at 528.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

James in the 1950s<sup>173</sup> and O'Connell in the 1970s.<sup>174</sup> As the ALI *Reporters' Study* has recently reiterated, "little incentive to take care is lost when a patient (or worker or consumer) [or persons injured on a business premise or by a railroad] is told that even though he might suffer a painful, perhaps even fatal injury, he or his surviving dependents will be able to recover compensation for the losses."<sup>175</sup>

Because our proposed doctrine provides an assurance of compensation, it should, as suggested by Justice Traynor, be accompanied by "curbs on such potentially inflationary damages as those for pain and suffering. Otherwise the cost of assured compensation could become prohibitive."<sup>176</sup> The substantive premises have long been in place for the judicial reform of damages law. In 1977, for example, the California Supreme Court in *Borer v. American Airlines, Inc.*<sup>177</sup> wrote of the "strong policy reasons" that argue against compensation of "intangible, nonpecuniary loss."<sup>178</sup> Such losses were seen as "difficult to measure," and the court wrote that they "can never be compensated" by money damages.<sup>179</sup> Moreover, "the burden of payment . . . must be borne by the public generally in increased insurance premiums or, otherwise, in the enhanced danger that accrues from the greater number of people who may choose to go without any insurance."<sup>180</sup> These policy considerations, of course, support limitations on the award of pain and suffering damages, as well as the elimination of the collateral source rule.

In their consideration of the proper measurement of damages in this new enterprise liability, courts could examine the array of approaches suggested by the enterprise liability scholars in the 1950s and early 1960s,<sup>181</sup> as well as more recent proposals by O'Connell and others.<sup>182</sup> O'Connell has proposed that courts simply abolish the award for pain and suffering, as well as the collateral source rule, while making an explicit award of attorneys' fees.<sup>183</sup> This proposal has the merit of a clean solution, clearly crafted along no-fault lines.

Of course, courts might be reluctant to make such an abrupt change in settled damages law, although this might be overcome by the fact that this

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<sup>173</sup> See Fleming James, Jr. & John J. Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 780 (1950).

<sup>174</sup> See *Compensatory*, *supra* note 33.

<sup>175</sup> 2 REPORTERS' STUDY, *supra* note 11, at 511.

<sup>176</sup> Traynor, *supra* note 91, at 376 (footnote omitted).

<sup>177</sup> 563 P.2d 858 (Cal. 1977).

<sup>178</sup> *Id.* at 862.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See NOLAN & URSIN, *supra* note 12, at 106-15.

<sup>182</sup> See 2 REPORTERS' STUDY, *supra* note 11, at 159-316; Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 938-65 (1989); Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517 (1984).

<sup>183</sup> See *Compensatory*, *supra* note 33, at 591; *Payment*, *supra* note 33.

change accompanies a liability rule that assures compensation in this category of accidents. Courts might prefer, however, to formulate their new damages rule in Louis Jaffe's terms, stating as a guideline that "the award for pain and suffering . . . be measured and justified in terms of a contribution to the real costs of the litigation."<sup>184</sup> Or courts might prefer, at least initially, to adopt Justice Traynor's rule of thumb that "ordinarily the part of the verdict attributable to pain and suffering does not exceed the part attributable to pecuniary losses."<sup>185</sup> This approach, in fact, would provide for attorneys' fees, while decreasing the amount of litigation sparked by uncertainty regarding the size of pain and suffering awards.<sup>186</sup> Each of these approaches would, as James urged, recognize "within the framework of common law development . . . the need for . . . progressively adopting a functional view of the amounts to be recovered."<sup>187</sup>

Our conclusion is that our proposed enterprise liability doctrines can be achieved by courts operating "well within the framework of our common law tradition"<sup>188</sup>—by courts elaborating upon and refining the enterprise liability premises embedded in the tort law of the past three decades. The proposed doctrines thus provide a means for courts to meet James's 1959 challenge for "common law development [that] produce[s] a prompt, widespread, and, above all, equitable distribution of payment in accident cases."<sup>189</sup> Moreover, precisely because the proposals add to common law precedent the insights of no-fault compensation plans, they also offer the "promising blend of efficient compensation, economical administration, and effective prevention"<sup>190</sup> that has recommended no-fault plans from workers' compensation to the recent ALI *Reporters' Study* medical no-fault proposal.

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<sup>184</sup> Jaffe, *supra* note 27, at 235.

<sup>185</sup> *Seffert v. Los Angeles Transit Lines*, 364 P.2d 337, 346 (Cal. 1961) (Traynor, J., dissenting).

<sup>186</sup> As courts seek to define what cases would not be governed by Justice Traynor's "ordinarily" qualifier, damages law might evolve in the direction of guidelines based on profiles of various types of accidents and appropriate awards. For a succinct discussion of the possibility of scheduling pain and suffering awards, see 2 REPORTERS' STUDY, *supra* note 11, at 33. See also Bovbjerg, *supra* note 182, at 937; Danzon, *supra* note 182.

<sup>187</sup> James, *supra* note 32, at 585.

<sup>188</sup> James, *supra* note 21, at 924.

<sup>189</sup> James, *supra* note 36, at 424.

<sup>190</sup> 2 REPORTERS' STUDY, *supra* note 11, at 534. See also Schwartz, *supra* note 125, at 430.

